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Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel

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Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel

Chairman: Mr. Christian **Wenaweser** (Liechtenstein)

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I. Introduction

1. The General Assembly, in its resolution 58/82 of 9 December 2003, decided that the Ad Hoc Committee established pursuant to resolution 56/89 of 12 December 2001 should reconvene from 12 to 16 April 2004, with a mandate to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument, and that the work should continue during the fifty-ninth session of the Assembly within the framework of a working group of the Sixth Committee.

2. At its first meeting, on 4 October 2004, the Sixth Committee established the Working Group to continue the work pursuant to General Assembly resolution 58/82 and elected Christian Wenaweser (Liechtenstein) as its Chairman. At the same meeting, the Sixth Committee decided to open the Working Group to all States Members of the United Nations or members of the specialized agencies or the International Atomic Energy Agency (IAEA).

3. The Working Group held four meetings, on 11, 12 and 15 October 2004. In view of the importance of the subject under consideration, the Working Group decided, at its first meeting, on 11 October, to hold the formal meetings of the Working Group in open sessions.

4. The Working Group had before it the report on the work of the third session of the Ad Hoc Committee[1] as well as the report of the Secretary-General on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (A/59/226).[2] It also had before it the Chairman's text on an instrument expanding the scope of legal protection under the Convention on the safety of the United Nations and Associated Personnel, which appears, as revised, in annex I.A to the present report. The Chairman's text was an outcome of intersessional informal consultations and bilateral contacts, building upon work accomplished during previous discussions.

5. The Working Group considered and adopted its report at its 4th meeting, on 15 October 2004.

II. Proceedings of the Working Group

6. The Working Group held a brief general exchange of views regarding its organization of work at its 1st meeting, on 11 October. The Working Group agreed to use the Chairman's text as the basis of work for current and future discussions concerning the expansion of the scope of legal protection under the Convention, while it was understood that this would not limit the right of delegations to make suggestions thereon. Substantive discussions were subsequently held on expansion of the scope of legal protection under the Convention, on the basis of the Chairman's text. Substantive discussions were also held on the revised text of a proposal concerning the relationship between the Convention and international humanitarian law submitted by Costa Rica, which is contained in section B of the annex to the report of the Ad Hoc Committee at its third session[3] and reproduced in annex I.B to the present report. The Working Group agreed to deal with the two issues concerning expansion of scope and relationship separately in future discussions. An informal summary of the discussions on the Working Group,

prepared by the Chairman, appears in annex II to the present report. The summary is intended for reference purposes only and not as an official record of the discussions.

III. Recommendations and conclusions

7. At its 4th meeting, on 15 October, the Working Group decided to refer the present report to the Sixth Committee for its consideration and recommended that the Ad Hoc Committee established pursuant to General Assembly resolution 56/89 be reconvened with a mandate to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument.

8. The Working Group also recommends that the Chairman's text, as contained in annex I.A to the present report, be used as the basis of work of the Ad Hoc Committee. The Working Group also recommends that the proposal by Costa Rica reproduced in annex I.B to the present report be considered by the Ad Hoc Committee separately.

Notes

[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 52* (A/59/52). The Ad Hoc Committee held its first and second sessions in 2002 and 2003, respectively. For the reports of the two sessions see ibid., *Fifty-seventh Session, Supplement No. 52* (A/57/52) and *Fifty-eighth Session, Supplement No. 52* (A/58/52). Work also continued within the framework of the Sixth Committee at the fifty-eighth session of the General Assembly in 2003. The report of the Working Group is contained in document A/C.6/58/L.16.

[2] For previous reports of the Secretary-General, see A/55/637 and A/58/187.

[3] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 52* (A/59/52).

Annex I

Proposals

A. Chairman's text

The States Parties to this Protocol,

Recalling the terms of the Convention on the Safety of United Nations and Associated Personnel done at New York on 9 December 1994,

Deeply concerned over the continuing pattern of attacks against United Nations and associated personnel,

Conscious of the particular risks faced by personnel engaged in United Nations operations conducted for the purposes of [delivering humanitarian, political and development assistance, including in humanitarian emergencies and in conflict and post-conflict situations,]

[*Convinced* of the need to have in place an effective regime to ensure that the perpetrators of attacks against United Nations and associated personnel engaged in United Nations operations are brought to justice,]

Have agreed as follows:

Article I
Relationship

This Protocol supplements the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994 (hereinafter referred to as "the Convention"), and as between the parties to this Protocol the Convention and the Protocol shall be read and interpreted together as a single instrument.

Article II
Application of the Convention to United Nations operations

1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the [primary] purposes of

Alternative A

delivering humanitarian, political or development assistance.

Alternative B

delivering humanitarian, political or development assistance in armed conflict or post-conflict situations.

Alternative C

delivering emergency humanitarian, special political or development reconstruction assistance.

2. [A Party to this Protocol shall not be required to apply article 2, paragraph 1, of the Protocol in respect of] [Paragraph 1 does not apply to] any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations.

Article III

The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right as a host [or transit] State, [where provided by any agreement consistent with article 4 of the Convention,] [or as a transit State] to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State. [, provided that such action is not in violation of any other international law obligation of the State Party].

Article IV
Signature

This Protocol shall be open for signature by all States at United Nations Headquarters for the twelve months from x/x/xxxx to x/x/xxxx.

Article V
Consent to be bound

1. This Protocol shall be subject to ratification, acceptance or approval by the signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

2. This Protocol shall, after x/x/xxxx, be open for accession by any non-signatory State. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

3. Any State that is not a State Party to the Convention may ratify, accept, approve or accede to this Protocol if at the same time it ratifies, accepts, approves or accedes to the Convention in accordance with articles 25 and 26 thereof.

[final clauses to be inserted]

B. Proposal by Costa Rica[a]

The parties to this Protocol shall not apply the Convention in respect of any acts governed by international humanitarian law performed during an armed conflict and directed against any United Nations or associated personnel who are not entitled to the protection given to civilians under the international law of armed conflict.

[a] Issued previously as document A/AC.264/2004/DP.2 and Corr.1.

Annex II

Informal summary of the general discussion in the Working Group, prepared by the Chairman

A. Summary of general comments

1. Delegations expressed their deep concern over the continued attacks and acts of violence against the United Nations and associated personnel, unequivocally condemned those attacks as unjustifiable and unacceptable and urged that the perpetrators of these crimes be brought to justice. The point was also made that the increased dangers and the security risks faced by local staff of the United Nations offices and international staff of United Nations humanitarian agencies and non-governmental organizations necessitated the reinforcement of their safety and security.

2. Support was expressed for the preparation of an additional protocol to the 1994 Convention, which would broaden the scope of the protective regime of the Convention, cover certain United Nations operations other than peacekeeping operations and dispense with the requirement for a declaration of exceptional risk.

3. Delegations welcomed the efforts undertaken by the Chairman with the assistance from a number of delegations, which had resulted in the Chairman's text before the Working Group. It was agreed to hold future deliberations on the basis of that text, while it was understood that this would not limit the right of delegations to make suggestions thereon.

B. Consideration of the Chairman's text

Article II, paragraph 1

4. With regard to the first part of the sentence of paragraph 1 of article II, there was a general understanding, following discussion, that each of the terms within brackets, "by" and "pursuant to a mandate of", would include operations established by the General Assembly, the Security Council and the Secretary-General. Thus, since several delegations expressed their support for repeating the language of the 1994 Convention, it was agreed to retain the word "by" and delete the words "pursuant to a mandate of".

5. Concerning the word "primary", the view was also expressed that it should be retained. Other delegations were flexible as to its retention.

Alternative A

6. A number of delegations expressed their support for alternative A, pointing out that it offered clear language that better reflected the range of operations in which the United Nations was engaged while retaining the notion of risk. It was explained that operations conducted for the purpose of "delivering humanitarian, political or development assistance" carried a degree of inherent risk. It was recalled that during the negotiations of the 1994 Convention the definition of United Nations operations was subject to similar discussions as to whether it should be broad or narrow. In the meantime, it had become clear that a narrower definition would not provide

sufficient coverage. Therefore, a different approach should be adopted with regard to that definition in the protocol. In their view, alternative A offered an unambiguous and pragmatic definition of United Nations operations, which was, at the same time, not too broad since permanent offices were excluded from the scope by paragraph 2 of article II.

7. However, other delegations found that the definition in alternative A was too broad and would encompass all United Nations operations, whether or not they would entail any risk. The point was also made that in non-risk situations, other legal regimes, such as national law enforcement mechanisms as well as the Convention on the Privileges and Immunities of the United Nations (1946), the Convention on the Privileges and Immunities of the Specialized Agencies (1947) and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), served to protect the personnel and to prosecute the perpetrators of acts against them.

Alternative B

8. A number of delegations were of the view that alternative B better retained and reflected the notion of risk while, at the same time, expanding the legal protection offered by the Convention to a broad range of operations. In this regard, it was observed that the 1994 Convention had been concluded in order to protect personnel in peacekeeping operations because of the element of risk involved in such operations and that the problem of the 1994 Convention related to the declaration of exceptional risk as a trigger mechanism and not to the notion of risk itself. In their view, alternative B removed the trigger mechanism while including a wide range of operations conducted in armed conflict and post-conflict situations. Furthermore, it was also stressed that a declaration of risk could still be made under the Convention, when necessary, in order to include those operations that entailed risk and were not covered by the definition in alternative B. It was also stated that the term "armed conflict" was defined under international humanitarian law and that the term "post-conflict" was well understood within the United Nations context and would not give rise to problems of interpretation. It was also observed that alternative B contained some elements that might assist those States that had not done so to adhere to the 1994 Convention and thereby contribute to the goal of universal ratification of the Convention.

9. However, other delegations expressed the view that alternative B was too narrow as it would exclude situations entailing risk that did not occur specifically within an armed conflict or a post-conflict situation. In this regard, refugee situations and other risky situations caused in neighbouring States as a result of armed conflict in one State and situations following natural disasters were offered as examples that would fall outside the scope of application under alternative B. It was also pointed out that the notion of "post-conflict" contained an element of subjectivity, which the optional protocol aimed to eliminate. Those delegations expressed their support for an objective and automatic application of the Convention also to such operations as described above and that the use of the declaration of risk for those operations would give rise to the same problems as were known from past practice.

10. Some delegations were of the view that alternative B, with some redrafting, may constitute a good basis for further discussion. For example, concern was

expressed that the current use of the terms "armed conflict and post-conflict situations" might be ambiguous and that situations leading up to armed conflict or affected by an armed conflict in a nearby country might fall outside its scope. In this regard, the words "in situations affected by armed conflict" were suggested as alternative language to the current wording in alternative B.

Alternative C

11. Some delegations favoured alternative C. It was explained that this alternative offered more clarity than alternative A and better incorporated the element of risk by using further refined language while, at the same time, providing a broader definition than alternative B. It was noted that the qualifiers, such as "emergency", "special" and "reconstruction", could be subject of further fine-tuning.

12. Several delegations, while expressing their support for the various alternatives, indicated their flexibility and willingness to further refine the language proposed in the different alternatives.

Article II, paragraph 2

13. Several delegations expressed their support for the retention of the paragraph if alternative A were to be adopted in paragraph 1. Furthermore, some delegations considered the text within the second set of brackets, "Paragraph 1 does not apply to", to be their preferred option. It was also observed that the language in the first alternative would lead to difficulties of interpretation. The opinion was also expressed that paragraph 2 of article II should be deleted if alternative B was adopted.

Article III

14. It was stated that the draft article III intended to clarify the relationship between articles 4 and 8 of the 1994 Convention on the Safety of United Nations and Associated Personnel. However, it was pointed out that the following elements contained in article 8 of the Convention should continue to apply to the protocol under discussion. First, if United Nations or associated personnel were captured or detained in the course of the performance of their duties, they should not be subjected to interrogation and they should be released promptly. Second, if an applicable status-of-forces or status-of-mission agreement between the United Nations and a host State existed, the provisions of that agreement would override the provisions of the Convention. Accordingly, it was stated that the bracketed phrase in the draft, which refers to article 4 of the Convention, would alter the balance that existed in the Convention. It was also stated that the bracketed language states the obvious and did not have any added value.

15. The view was also expressed supporting the retention of the last sentence in draft article III. It was stated in this regard, that some countries continue to have difficulties with the Convention because of the current wording of article 8. It was further stated that the ability of States to exercise their jurisdiction should not be unduly restricted, particularly in view of the expanded version of the definition of United Nations operations.

16. A suggestion was made to replace "national jurisdiction" in the sixth line of the draft, with "domestic jurisdiction". It was further proposed that the

"jurisdiction" could be retained without specifying either "national" or "domestic". The latter suggestion was favoured by other delegations.

17. The following rewording for the draft article III was proposed:

> The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violate the laws and regulations of that State, [provided that such action is not in violation of any other international law obligation of the State Party, including without limitation to an obligation arising out of an agreement consistent with article 4 of the Convention].

Articles IV and V

18. Concerning the relationship of the proposed protocol with the 1994 Convention on the Safety of the United Nations and Associated Personnel, it was pointed out that articles IV and V of the Chairman's text were based on the provisions of a counter-terrorism instrument, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[b] which does not allow States to become parties to the Protocol unless they become parties to the Convention. It was suggested in this regard, that articles IV and V of the Chairman's draft should be redrafted to follow articles 5 and 6 of the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,[c] which allowed States to become bound to the instrument by their signature, if they so wished.

C. Consideration of the proposal by Costa Rica on the relationship between the Convention and international humanitarian law

19. In introducing the revised text on the relationship between the 1994 Convention and international humanitarian law, as contained in section B of the Annex to the report of the Ad Hoc Committee on its third session,[d] the representative of Costa Rica noted that several improvements had been introduced over an earlier draft in the light of bilateral consultations and comments made by delegations. In this connection, the revised text focuses on particular acts on a case-by-case basis instead of applying generally to any United Nations operation. Furthermore, it concentrates on more serious crimes since common crimes are still covered by the Convention.

20. Concerning the rationale for the proposal, Costa Rica recalled that it was intended to restore balance between the protection offered by international humanitarian law and the protection under the Convention. In that regard, the proposal sought to address an issue first raised by the Secretary-General in his report on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel,[e] wherein it was noted that the exclusion from the

[b] United Nations, *Treaty Series*, vol. 1589, No. 14118.
[c] United Nations, *Treaty Series*, vol. 1678, No. 29004.
[d] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 52* (A/59/52).
[e] A/55/637, footnote 3.

scope of application of the Convention of Chapter VII United Nations operations carried out in situations of international armed conflict gave rise to the suggestion that enforcement actions carried out in situations of internal armed conflict (UNOSOM II-type operations) are included within the scope of the Convention and subject to its protective regime. On the contrary, it was not the nature of the conflict that should determine the applicability of international humanitarian law, but rather whether, at any time during the conflict, members of the United Nations operation were actively involved as combatants or were otherwise entitled to the protection accorded to civilians under the international law of armed conflict. The United Nations was protected as long as it was entitled to the protection given to civilian or civilian objects under the international law of armed conflict. Moreover, this position comported with the provisions of the Rome Statute of the International Criminal Court, by the terms of which attacks against United Nations personnel and property were considered war crimes under article 8 (2) (b) (iii) concerning an international armed conflict and article 8 (2) (e) (iii) in relation to an armed conflict not of an international character.

21. In the view of Costa Rica, the savings clause in article 20 of the Convention was not adequate since it did not cover all United Nations operations.

22. Costa Rica noted that the imbalance would ideally be resolved through an amendment to the Convention. However, in the absence of any such efforts thus far, the proposal was made in the context of the present effort in order to obviate a worsening of the situation. This was all the more important since the draft optional protocol under consideration sought to extend the scope of legal protection under the Convention. In this connection, it was suggested that the proposal be incorporated into the Chairman's text.

23. In their comments, delegations addressed both the substantive and procedural aspects of the proposal. They acknowledged that the relationship between the Convention and international humanitarian law raised complex legal questions, not only in respect of the Convention but also of the draft Protocol. Some delegations expressed support for the proposal. It was noted that article 2, paragraph 2, of the Convention was narrow and specific in scope. The proposal of Costa Rica would therefore assist in covering both international and non-international armed conflicts. The view was also expressed that the proposal was necessary in order to eliminate any possible uncertainty in the application of the Convention, in conformity with the principle of *ex abundanti cautela*.

24. Some delegations considered that the proposal raised complex issues, which could not adequately and appropriately be addressed within the framework of an optional protocol. In substance, it effectively constituted an amendment of article 2 of the Convention. It was also suggested that its consideration would slow down the work on the draft Protocol. In this regard, it was proposed that for the time being, the focus should be on addressing questions concerning the extension of the scope of legal protection under the Convention.

25. Some other delegations, while recognizing the complexity of the matter, noted that the subject matter was worthy of further consideration and was relevant in the context of the work of the Working Group. The problem was not in the proposal per se but in the application of the Convention. In this regard, the suggestion was made that the question of expansion of the legal protection under the Convention and the question of relationship could be discussed concurrently, without prejudice to the

final outcome of work on the subject. The Working Group should focus on the draft protocol while keeping in mind the proposal by Costa Rica. Thus, the possibility of concluding two separate instruments would not be excluded.

26. Concerning the text of the proposal, some delegations pointed out that it contained subjective elements, which the current exercise was actually seeking to eliminate. It was necessary to ensure automatic application based on objective criteria. Moreover, the application of the provision on a case-by-case basis would bring about undesirable practical consequences. It would entail making determinations on complex matters in volatile situations where it was often difficult to make a determination on the combatant or non-combatant status of personnel, or indeed whether such status would be altered when such personnel were acting in self-defence. The possibility of such ambiguities in interpretation would be unwelcome. The comment was also made that the Costa Rican proposal would afford less protection to United Nations personnel. For example, under international humanitarian law prisoners of war may be held until the end of the state of hostilities while under article 8 of the Convention, United Nations personnel who are captured or detained should be released immediately. Some delegations objected to the proposal by Costa Rica since the interpretation or application of article 2 of the Convention was not intended to cover an internal armed conflict.

27. A number of delegations also sought clarification on or made drafting suggestions to the text. Thus, clarification was sought concerning the meaning of the phrase "... governed by international humanitarian law ...". Since the proposal was essentially an amendment to the Convention, it was suggested that the phrase, "The parties to this Protocol shall not apply ..." be replaced by the phrase "Neither the Convention nor the Protocol shall apply ...". It was also suggested that the reference to "... under the international law of armed conflict.", which was viewed as synonymous with international humanitarian law, be replaced by the phrase "... under such law". Similarly, it was suggested that the word "... performed ..." be replaced by the word "... done ...".

28. In response to some of the comments, the representative of Costa Rica noted that whether one's status as a combatant changed in the exercise of self-defence depended on the level of belligerency. Furthermore, the representative noted that subjectivity was in the nature of international humanitarian law and could not be avoided. It was also stressed that the proposal was intended to strengthen protection of United Nations and associated personnel and that such protection was assured by the equal observance of international humanitarian law on the basis of the principle of reciprocity.

29. It was agreed that the proposal be kept on the agenda and be treated separately from the current exercise on drafting a protocol to expand the scope of legal protection under the 1994 Convention.